A COMPENSATION LAW AND PRIVATE JUSTICE

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In the states of the civilized world there are two systems of employers' liability for accidental injuries. The first, which formerly prevailed in all, but which now survives only in the United States and, in a transition stage, in Switzerland is that of tort, or more particularly the master and servant branch of the law of negligence. The second is that of "compensation," which embraces both "simple compensation" and also its more complex form of "compulsory insurance"—for "compulsory insurance," where and in so far as it is at the expense of employers, is in effect simply a liability to pay compensation for accidental injuries to employees, with a legal obligation added to insure its payment.

The majority of the advocates of "compensation" base their arguments entirely upon reasons of social welfare. Under that line of argument, in order to sustain a compensation law under our constitutions, it is necessary to rely exclusively upon the "police power" —a power possessed by the state which permits it to inflict individual hardship and injustice where necessary for the public welfare. But the law should seek, wherever possible, to effect private justice; and the case for "compensation" would be infinitely strengthened and the probability of repetitions of the reverse suffered in the recent decision of the New York Court of Appeals would be diminished if it can be demonstrated that the liability, as between master and servant, which the compensation law imposes, is just. In my opinion that liability is just, not absolutely, just in theory, because it abandons the unattainable ideal of affecting exact justice in each particular case, but as just as is possible in practice and relatively most just in comparison with the existing liability for negligence. In this paper I shall endeavor to explain my reasons for that opinion; but in order to be brief and for that purpose to avoid complexities from varying conditions I will limit my arguments to those which apply with full force only to employment in the more hazardous organized industries, to which, in my judgment, our first experi-

ments in the law of compensation should be limited in their application.

In my opinion the two systems of employers' liability law are not totally different in their fundamental principles of private right, but the principles of the compensation law are developments from the principles of the negligence law, corrected to conform to the lessons of experience and to modern scientific knowledge and modified with a view to concrete as distinguished from abstract justice. While the foreign compensation laws are all shaped in many of their details, and in some cases in their entire forms, with a view solely to the general social welfare, nevertheless as a system it will be found that the principles of private justice underlie them all. If this view is sound and if those principles of private justice become generally accepted here, then the substitution of the liability for compensation in the place of the existing liability for negligence would be in accord with, instead of being a departure from, the spirit of our common law and of the principles of the Bill of Rights in our constitutions.

The compensation law, as a rule of private justice, differs from the law of negligence in principle in that it changes the rules of "contributory negligence," of "assumption of risks" and of "fellow servant," the criterion of "negligence" and the rules governing the burden of proof—and in that it fixes a definite and limited measure of the amount of the liability.

Our rule of "contributory negligence" is peculiar to the common law, and there are now few who believe in its justice. But although the rule may be unjust, yet simply to abolish it and to make the employer liable for full damages, as if there had been no contributory negligence, would be equally unjust, because that would merely shift the injustice from the workman to the employer. The proper correction is to divide the damages. That is what the Admiralty and the civil laws have always done, and what the compensation law in effect does.

The justice of the "assumption of risks" rule is predicated upon the premises that workmen are free to assume or reject hazardous employment, and, consequently, that when they accept such employment, they should be deemed to contract freely to assume its risks; and that wages in hazardous employments are higher in proportion to the hazard so as to compensate for such risks. But

facts demonstrate that working people in the mass are not economically free to accept or reject hazardous employment, and that wages are not at all in proportion to risks. Therefore, the premises upon which the rule of assumption of risks is based are generally false, and the rule itself is not a true rule of justice. But if justice requires the abandonment of the assumption of risks rule, its corollary, the fellow servant rule, should also be abandoned; for danger from the faults of intimately associated fellow servants is one of the occupational risks, *all* of which, as a general rule, a workman either should or should not be deemed to assume. And so far as the fellow servant rule is supported by reasons of public policy, it has no true application to the organized industries, wherein the individual workman cannot, by any degree of care, protect himself from the faults of his fellows.

But here again the proper correction is not simply to abolish the defences of "assumption of risks" and of "fellow servant" so as to leave the employer liable for full damages, for that would merely shift the injustice and make the employer liable for a wrong, where he has been guilty of no wrong. The compensation law solves this problem of justice by treating all the necessary risks of employment as joint risks, of which the consequences should be shared between the employer and his injured workmen; and it accordingly imposes upon the employer a legal liability, similar to that of an insurer, to pay to his injured workmen, or their dependents, his share (generally one-half) of their wage losses resulting from such risks. This conception of a joint occupational risk, of a mutual responsibility for accidents from occupational risks, of a moral partnership in the resulting losses, is the great basis of the compensation liability. As a conception of justice it is primary and must either be accepted as an axiom or be rejected. But the idea of its justice is fortified by the fact that as a rule of public policy it has practical merits and advantages above all others. It, therefore, appears to be the best rule for the social welfare and, at the same time conforms to a widely accepted idea of justice.

The next point of difference between the two systems of law is the criterion which determines when, on the one side, the employer shall be subjected to liability for full damages, and when, on the other side, the injured workman shall be deprived of the right to any redress. Under our master and servant law that criterion is

"negligence as a proximate cause"—a criterion which in practical application is so indefinite and uncertain in meaning as to be most unsuitable for that purpose, as is evidenced by the thousands of litigated cases to which its definition has given rise. It has the further demerit of being scientifically superficial. Under the compensation law that criterion is "moral fault," variously defined, but always so defined and limited as to include only such a degree of certain moral fault as justifies, beyond doubt or reasonable difference of opinion, the infliction of a penalty upon the defaulting party. From the application of this latter criterion it results that that large proportion of accidents, which are due proximately to lack of ability, misjudgment, lack of skill, ignorance, physical or mental lassitude, mere inadvertence or that kind or degree of negligence which, humanly speaking, is at times inevitable even with careful men, and which, under our negligence law, result in a mass of litigation and entirely fortuitous determinations, are, under a compensation law, not attributed to fault but rather to the necessary risks of employment; and, consequently, for injuries resulting therefrom the employer is made liable to pay his share of the injured workmen's wage losses in the form of compensation.

The next difference between the laws of "negligence" and of "compensation" is that under the compensation law there is a presumption of fact that every accident results from a necessary risk of the employment or from some cause or causes for which employer and injured employee are jointly responsible, and is, therefore, a subject of compensation, unless fault is proved; and the burden of proving fault is upon the party asserting it. Is that presumption just? My answer to that question is that an intensive study of the causes of accidents in New York factories and a critical analysis of the European accident statistics convinces me beyond all doubt that, at least under conditions which prevail in the organized and hazardous industries, that presumption is true, and therefore just.

The final difference between the two laws is that under the compensation law the amount of compensation is measured by the law instead of by the almost unlimited discretion of the jury, and is made dependent upon certain definite facts, which are generally easily and certainly provable. Whether this method of fixing the amount of the liability is just or not should be determined by its

results. The object of the law is to do justice. It should, therefore, be framed to effect average concrete justice, rather than to declare abstract rules of exact justice which cannot be carried out in practice; and this rule of the compensation law has these qualities of concrete justice, which are entirely lacking in the negligence law, that it is generally prompt, certain and uniform in its operation.

Finally, the compensation law possesses that highest attribute of a just law, that it satisfies the natural sense of justice of the parties affected by its application; for it is the general testimony of both employers and employees in the majority of the compensation law countries that the law in the main is just and satisfactory.

In contrast with the compensation law, our negligence law gives universal dissatisfaction. Not only is it in many respects absolutely unjust, but even so far as its theories are just it fails to carry out those theories in practice, but results instead in a medley of cruel wrong, oppressive waste and delayed or compromised justice. Moreover, its theories are such that they cannot be carried out in practice, because that would require an impossibility, namely: that accidents be correctly traced to their respective causes and the responsibility for those causes correctly weighed and determined by judges and juries. Abroad, even experts, making many of their investigations on the spot and unhampered by the motives for concealment which prevail here, cannot with any certainty determine the true causes of and responsibility for a large proportion of the accidents which they investigate, and, as to the mass of industrial accidents, can only arrive at rough opinion estimates of average causes and responsibilities. It is obvious that judges and juries, especially under our methods of procedure, are infinitely less able to arrive at that exact determination of the causes of and responsibility for each accident which a correct application of our law requires. Therefore our law, even in so far as it is good in theory, is absurdly bad in practice.

The fault lies not so much with the machinery of our courts as with the law itself. For the law starts from an unfair basis, by imposing the burden of proof entirely upon the injured workmen, and thereby insures injustice to them where, as happens, in a large proportion of cases, from the very nature of the accidents, there can be no real proof. And, where there is a scintilla of proof, our law is wrong, not so much in making jurors judges of the facts, as

in making them judges of a broad field of inferences from distorted versions of a part of the facts, without scientific rule or reason to guide them. The result not only is, but must be a pure gamble, more expensive, wasteful, distressing and corrupting than any form of gambling prohibited by the penal law.

In my opinion it is altogether a mistake to seek to remedy the existing evils along the lines of our "employers' liability" statutes. Those laws are in too many respects grossly unjust to employers, increase litigation, are expensive and wasteful, are slow and uncertain in results, and furnish small additional relief to the victims of industrial accidents in the mass. And they have a disastrous effect upon the public welfare, for they foster class antagonism between employers and employees, and they interfere with proper methods for the prevention of accidents by establishing through the decisions of our courts harmful rules and precedents on questions affecting safety.

An illustration of this last proposition may be enlightening. We have in our New York Labor Law a provision that certain machinery shall be "properly guarded." The factory inspectors, in their enforcement of that law, construe that provision to mean that such machinery must be so arranged, placed, boxed, railed off, or provided with safety appliances as to be made as safe as practicable. But our courts construe it more literally to mean that such machinery must have applied to or about it something extra as and for a guard, without particular regard to whether or not that will make the machinery more safe or more dangerous. Of course, the courts have not categorically said that, but that is the effect of what they have decided. There are many cases in New York where juries have awarded and our higher courts have sustained verdicts for punitive damages against employers for not guarding their machinery in a way which, according to the overwhelming preponderance of expert opinion, would make it more dangerous. Such decisions are the opposite of or conducive to the general adoption of correct methods for the prevention of accidents. And this is but one of many points about which the reasonings and decisions of our courts on questions affecting safety are as foreign to scientific truth as are the ideas of an Indian medicine man about the causes and prevention of disease. It is a principal merit of the compensation law that under it questions of industrial safety would

cease almost altogether to be a subject for judicial determination, and that the intelligence and efforts of employers would then be directed towards the prevention of accidents instead of towards the maintenance of arbitrary conditions and practices which will merely prevent liability for accidents.

While it is not demonstrable that the compensation laws have effected any reduction in the proportion of accidents, because there is not the requisite data for purposes of comparison; yet it is certain that the imposition of the compensation liability in lieu of all others (save in exceptional cases), would remove many difficulties in the way of studying the causes of accidents and the methods of their prevention, and would aid in the enforcement of safety regulations and be conducive to their voluntary adoption. And it is equally certain that our law has just the opposite effect, because it gives rise to an impellent motive for both the employer and the workman who is injured in an accident to suppress or falsify all the facts relative to that accident which might adversely affect their respective legal rights or liabilities. Consequently, in our country, this subject is to a degree hidden from expert investigation by a fog of suppression, misrepresentation and positive falsehood.

In conclusion I wish to emphasize three propositions, namely: that in the highly organized and hazardous industries the real causes of accidents are generally so complex and in addition often so remote, that as to a material proportion of the accidents it is impossible, by any methods or means, correctly to ascertain the facts necessary to form a correct judgment of their particular causes; that as to a yet larger proportion it is practically impossible to do so without such expense and delay as will defeat justice; and that as to those accidents, as to which the necessary facts are practicably ascertainable, there is no simple abstract term, such as "negligence," "carelessness," "fault," "gross negligence," etc., which, if used as a criterion of legal liability, will not result in frequent and gross injustice and inequality, whether administered and applied by courts and juries or by more competent experts. At first impression the exactness with which industrial accidents are classified in the German and Austrian statistical tables, under the headings of "due to fault," "unavoidable," "due to lack of skill and carelessness," etc., may seem to contradict these propositions. But in so far as those tables produce that impression they are misleading; for,

as to a major proportion of the accidents classified therein, the facts have not been thoroughly investigated, but rough statements have been relied on, and there is therefore in them a wide margin of probable error, due to that one cause; and the terms used in those tables are so far from being definite and are employed in each table with a meaning so uncertain in application and so peculiarly personal to its compilers that a re-classification of the accidents covered by that table, under the same terms, by a different set of experts, would inevitably produce widely different results. The conclusion to be drawn from these premises is, that the idea of ascertaining the facts as to each particular industrial accident and then determining liability according to the application to those facts of some simple abstract rule cannot be carried out in practice; but that, in order to obtain a rule of law which will be at all fair and uniform in practice, it is absolutely necessary to resort to the doctrine of averages. That is what the compensation law does by presuming in effect, save in exceptional cases where the contrary is proved, that every accident is due to a necessary risk of employment or to some other cause or causes for which employer and injured employee are jointly responsible; and it divides the damages accordingly.

In arguing for the justice of a compensation liability in the organized hazardous employments, I am not arguing against its justice in the unorganized or safer employments, because I believe that, with some important exceptions and subject to certain conditions, it would also, in practice, be more just therein than the existing liability for negligence. And I am not arguing that reasons of justice alone should determine the form which a compensation law should take; for I believe that reasons of social welfare and many other reasons should in many respects determine both the form and the extension of such a law. But I insist that such a law as that of master and servant should be based upon conceptions of private justice; and that the compensation laws are so based, and are not unprincipled measures of mere political expediency.